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In the Supreme Court of the United States

OCTOBER TERM, 1974

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

In Re:

~~Complaint as to the Conduct of~~
Charles O. Porter, ~~Accused,~~
Petitioner.

CHARLES O. PORTER, *pro se*
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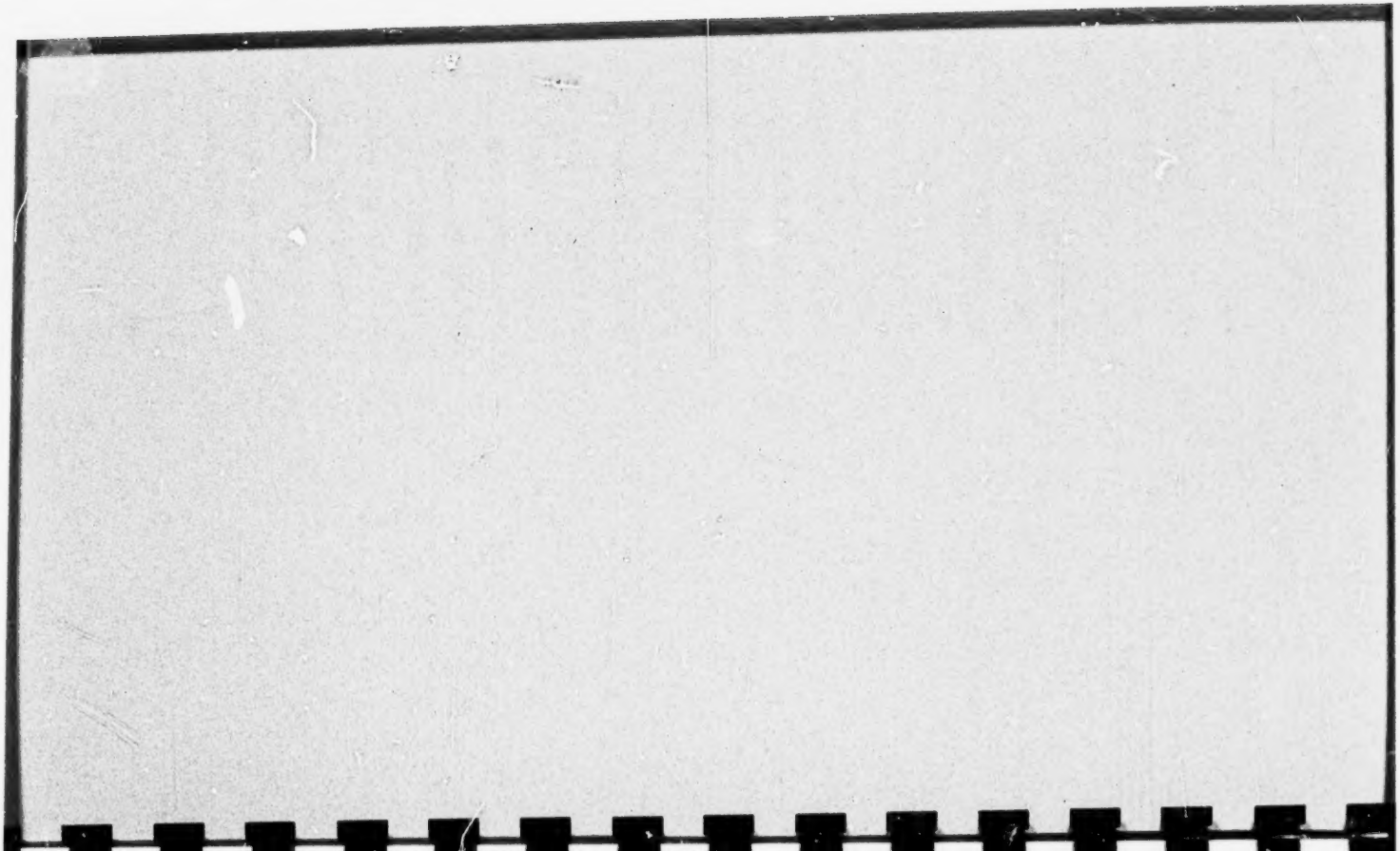
858 Pearl Street
Eugene, Oregon 97401
Counsel for Petitioner



PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Charles O. Porter, petitioner herein, prays that a writ of certiorari issue to review a judgment of the Supreme Court of the State of Oregon entered in the above entitled case on April 18, 1974.

Opinions Below

The opinion of the Supreme Court of the State of Oregon is reported in 521 P2d 345 and is printed in Appendix A hereto, *infra*, pp. 7-15.

Jurisdiction

The judgment of the Supreme Court of the State of Oregon (Appendix A, *infra*, pp. 7-15) was entered April 18, 1974. A timely petition for rehearing was denied on May 14, 1974. The jurisdiction of the Court is invoked under United States Code Title 28, Section 1257 (3).

Questions Presented

I. In what respects, if any, are the limitations on free speech more rigorous for lawyers?

II. Are petitioner's rights of free speech under the First Amendment to the United States Constitution violated when the Supreme Court of Oregon finds, with no basis in the factual record, that extra-judicial statements made by petitioner more

than ten months before any possible trial and published in the newspapers "tended to prevent a fair trial" whereas the disciplinary rule in question (*infra*, p. 3) sets forth a different criterion, namely, "reasonably likely to interfere with a fair trial of the action"?

III. Are petitioner's rights to equal protection under the Fourteenth Amendment to the Constitution of the United States protected under the circumstances stated above in view of the fact that the standard used for laymen under those circumstances is "a clear and present danger to the fair and effective administration of justice"?

IV. Are petitioner's rights to due process of law under the Fourteenth Amendment to the Constitution of the United States violated when the Supreme Court of Oregon holds that petitioner could have reasonably expected a certain extra-judicial statement about a rejected settlement offer to be disseminated to the public when the record uncontradictedly shows that petitioner was unaware of the presence of the reporter who overheard and reported petitioner's statement and that petitioner had no reason to believe that the statement in question would be published by any reporter?

United States Constitutional Amendments Involved

> "Congress shall make no law . . . abridging the freedom of speech . . . "
>
> Amendment I.

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person

of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

Section 1, Amendment XIV.

Statute Involved

"A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extra-judicial statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication and that relates to:

1. Evidence regarding the occurrence or transaction involved.
2. The character, credibility, or criminal record of a party, witness, or prospective witness.
3. The performance or results of any examinations or tests or the refusal or failure of a party to submit to such.
4. His opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.
5. *Any other matter reasonably likely to interfere with a fair trial of the action."* [Emphasis added]

DR 7-107(G) adopted by the Supreme Court of Oregon Dec. 30, 1970, under the authority Section 9.490 of Oregon Revised Statutes.

Statement

Petitioner on February 8, 1973 was charged with six causes of complaint by the Oregon State Bar in violation of DR 7-107(G) *supra*, p. 8. The Oregon State Bar trial committee concluded that petitioner was not guilty of any of the six charges and recommended the termination of the proceedings.

The Oregon State Bar Board of Governors, July 7, 1973, eight voting, two abstaining and two absent, disapproved the trial committee findings and found petitioner guilty on all six charges and recommended a public reprimand.

All but one of petitioner's extra-judicial statements in question were published before any civil action had been filed by petitioner for his client. The exception was a statement having to do with inadequacy of the settlement offer being the reason why the matter had to be tried. This statement was made to a newspaper reporter who was an old friend of petitioner and who did not cause it to be published, but it was published by a reporter who overheard petitioner's remark at that time and who was not known by petitioner to be a reporter nor was it shown that petitioner had any reason to know that the remark he made about settlement would be published.

No evidence was introduced in the hearing nor appears anywhere else in the record that the other extra-judicial statements made by petitioner and published in the press were reasonably likely to interfere with the fair trial of the civil case being investigated by the petitioner at the time. *In re Oliver*, 470 F2d 15, 17, 18 (7th Cir 1972).

Reasons for Granting this Writ

1. The petitioner as a lawyer ought to have rights of free speech to comment for publication on a civil action under investigation unless his exercise of that right reasonably tends to interfere with the defendant's right to a fair trial. *In re Oliver*, 452 F2d 111, 114, 115 (7th Cir 1971). The disciplinary rule in question (*infra*, p. 3) makes it clear that such statements on

evidence, character, etc., including "any other matter," must be "reasonably likely to interfere with a fair trial of the action." Subparagraph 5, DR 7-107(G), ~~infra~~ supra, p. 3. See *In re Oliver*, 470 F2d 15, 17 (7th Cir 1972).

All that the Supreme Court of Oregon opinion says, in the absence of any evidence in the record, is vague and speculative:

> "Such continual haranguing of the public through the news media about the virtues of his client's case and vices of the opposition would tend to have *some effect* and was *certainly* unprofessional." [Emphasis added] (*infra*, p. 12).

"Some effect" does not amount to "reasonably likely to interfere with a fair trial of the action" or "a serious and imminent threat to the administration of justice." *In re Oliver*, 452 F2d 111, 115, citing *Chase v. Robson*, 435 F2d 1059, 1061 (7th Cir 1970). "Certainly unprofessional" is a vague value judgment wholly unsupported by any evidence in the record. See *People v. Vaughn*, 514 P2d 1318 (Cal 1973); *Pollett v. U.S.*, 485 F2d 1087, 1092 (8th Cir 1973).

2. Petitioner's rights of free speech, equal protection and due process under the United States Constitution are violated when the Supreme Court of Oregon seeks to establish a more vague and more restrictive rule than DR 7-107(G) and attempts to lay down a more restrictive rule for the free speech and equal protection rights of attorneys as compared to those rights possessed by laymen. Petitioner asserts that his rights to free speech can only be denied to him when some countervailing value, such as the defendant's right to a free trial, is reasonably found to be threatened and that this standard is no different for

lawyers and laymen. *N.A.A.C.P. v. Button*, 83 S.Ct. 328, 341, 371 U.S. 415 (1963); *In re Oliver*, 452 F.2d 111, 114, 115 (7th Cir. 1971).

Petitioner's rights to free speech, equal protection and due process of law under the First and Fourteenth Amendments to the United States Constitution were violated when the Supreme Court of the State of Oregon issued him a public reprimand for extra-judicial statements published in the newspapers with no showing that these statements in any way affected the defendant's right of a fair trial and on the basis of the statement concerning settlement on the eve of the trial which, on uncontroverted evidence, petitioner had no reason to believe would be published.

Conclusion

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for petitioner

APPENDIX A

[521 P2d 345]

[Opinion filed April 18, 1974]

IN THE SUPREME COURT OF THE STATE OF OREGON

In Banc

In Re:

Complaint as to the Conduct of

Charles O. Porter, Accused.

Petitioner.

* * * * * * * * * * * * *

Review of decision and recommendations of the Board of Governors of the Oregon State Bar.

Argued and submitted January 9, 1974.

Charles O. Porter, Eugene, argued the cause and filed a brief in propria persona.

Richard Smurthwaite, Eugene, argued the cause for the Oregon State Bar. With him on the brief were William F. Frye, Eugene, and Douglas L. Minson, Portland.

PER CURIAM.

Accused reprimanded.

PER CURIAM.

The accused is charged with five separate violations of Disciplinary Rule 7-107(F) which is as follows:

> "(F) A lawyer or law firm associated with a civil action may quote from or refer to public records, but shall not during its investigation or litigation make or participate in making an extra-judicial statement for public communication that relates to:
>
> (1) Evidence regarding the occurrence or transaction involved.
>
> (2) The character, credibility, or criminal record of a party, witness, or prospective witness.
>
> (3) The performance or results of any examination or tests or the refusal or failure of a party to submit to such.
>
> (4) His opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.
>
> (5) Any other matter reasonably likely to interfere with a fair trial of the action."

The accused was retained by the husband of a woman who perished in the Cascade Mountains from hypothermia while taking wilderness survival training provided by Northwest Outward Bound School, Inc. While investigating and litigating the matter for his client, the accused is charged with having made five separate statements concerning the matter to the news media which he reasonably could have expected to be communicated to the public by the media and which were so communicated.

The accused is charged with saying on September 11, 1971, that the adverse party had sequestered a witness whom he had been unable to talk to and that "we are attempting to use the majesty of the law to do what common decency should have required to be done."

The accused is also charged with disclosing on September 17, 1971, the testimony of a witness, given by deposition which was taken by the accused, which disclosure related to evidence regarding the occurrence or transaction which was under investigation.

He is charged with telling the media on September 24, 1971, that "our evidence shows that the girls were not told anything about getting chilled. That's the basis for our suit—that they weren't instructed properly, if at all, about the dangers, the diagnosis and the treatment of hypothermia," and "[e]ven if they [referring to Northwest Outward Bound personnel] had instructed the girls, it's clear they did not get the message through to three of them—not just one of them, but three of them."

He is charged also with telling the media on September 29, 1971, that the claim on behalf of his client would be pressed, but that he believed the adverse party would be willing to make an out-of-court settlement after it had investigated the facts

The fifth cause charges that on June 18, 1972, which was two days prior to the time the case was set for trial, the accused told the media that the defendant in the action had made an offer of settlement, but that the offer was not adequate and the case would therefore proceed to trial.

The accused admits that he was associated with the matter

in question as the attorney for the husband of the deceased and that as to the first four charges, he made the statement to the media which is attributed to him in each instance, that he reasonably could have expected the statements to be communicated to the public, and that they were so communicated. As to the fifth charge he admits he made the statement to the media, but denies that he reasonably could have expected the statement to be communicated to the public.

The trial committee dismissed the first four charges against the accused because it found that DR 7-107(F) was not in effect at the time of the alleged conduct set forth in those charges. The committee found the accused not guilty of the fifth charge because it found that the accused could not reasonably have expected his statement to be communicated to the public. As a result, the trial committee recommended to the Board of Governors of the Oregon State Bar that the proceedings be terminated.

The Board of Governors rejected the recommendations of the trial committee and found the accused guilty of all charges and recommended to this court that he be given a public reprimand. The accused then filed a petition to review the findings and recommendations of the Board of Governors.

The first matter to be disposed of is the action of the trial committee in recommending the dismissal of the first four charges against the accused. DR 7-107(F), under which the accused was charged, went into effect when approved by this court on November 30, 1971, which was after the actions complained of in those charges. However, DR 7-107(F) was substantially the same as its predecessor, which was known as

DR 7-107(G) and which was in effect at the time the accused did the acts in question. The accused suffered no inconvenience because of the amendment changing the section designation, and dismissal of the charges is not merited on that basis. The error was not even known to the parties until it was apparently discovered by the trial committee at about the end of the hearing. To the accused's credit, no attempt is being made by him to make such a claim in this court on that basis.

Petitioner's primary defense is that he did not *willfully* violate the disciplinary rule. While the complaints against the accused alleged his actions "constituted willful misconduct," there is nothing in the rule which requires that the conduct there prohibited be committed willfully. "Willful" wears many coats and can mean anything from a simple intention to do an act to doing an act with a malicious and evil intent. *Starr v. Brotherhood's Relief and Compensation Fund*, 98 Adv Sh 1089, ____ Or ____, 518 P2d 1321 (1974); *State v. Wilcox*, 216 Or 110, 116-17, 337 P2d 797 (1959). The accused contends that the term, as used here, means that the bar must prove that he had actual knowledge of the disciplinary rule and intentionally violated it. While he admits that a copy of the rules was sent to him by the bar, he denies that he ever read the rule which is here in question and that he was aware of what it contained. He denies he intended to violate the rule and stated that he would not have made the statements prohibited by it had he known of the rule. "Willfully," as used in the complaint, means nothing more than that the accused intentionally and voluntarily made the remarks with the knowledge that they might be published. It has nothing to do, as used here, with an

evil intent to violate bar rules. If ignorance of the rule could vitiate prosecution, the policing of the bar for the protection of the public and litigants would undoubtedly be immeasurably more difficult than it is.

The accused also contends that the disciplinary rule under which he is charged is for the purpose of preventing an unfair trial of the action involved, and that there is no proof that the first four communications would have tended to prejudice such a trial because they were made prior to the actual filing of the case. He argues that the lapse of time between the statements and the trial would be so great that prospective jurors would have forgotten the publications. The exhibits indicate that the matter was of considerable interest in Lane County, which was the county in which the case would have been tried. The case was eventually settled and there is no way of proving what effect the publication of the statements had. It is our opinion that prejudice or unfairness is incapable of absolute proof and the only criterion that can be used is whether the published statements would tend to prevent a fair trial. We agree with the accused that the protection of the fairness of the trial is the principal purpose of the disciplinary rule. However, it is our conclusion that the statements made by the accused would tend to prevent a fair trial and that the accused's contention is not well taken. Such continual haranguing of the public through the news media about the virtues of his client's case and the vices of the opposition would tend to have had some effect and was certainly unprofessional.

The accused next contends that the evidence is clear and uncontradicted that he could not have reasonably expected his

statement which was the subject of the fifth charge to have been published. The evidence indicates defendant was walking through the Lane County Courthouse when he was accosted by an acquaintance of long standing who was a reporter for a local newspaper and who was accompanied by a representative of United Press. The conversation was brief and the accused admits he made the statement attributed to him. Both of the news people testified that neither is sure which one asked the accused about the case. The accused says he was not aware that anyone was with the reporter with whom he was acquainted. The accused testified he expected the reporter to respect his confidence though he did not tell him his statement concerning the insufficiency of the settlement offer was not for publication. The reporter did not use the information, but the United Press representative did, and thus the statement was widely disseminated. As a result of these publications, the trial judge granted a postponement of the trial which was scheduled for the second day after the conversation took place.

There was testimony by the United Press representative that he had previously met the accused at the accused's office for the purpose of interviewing one of the group of girls who had accompanied the deceased on the training activities during which she died. The accused also admitted that United Press called him on the telephone that evening to verify his statement which the news representative had reported and that he told the agency he had made the statement. The accused testified that he did not tell the agency the statement was not for publication because he had already heard the report of the statement on the radio prior to the time the inquiry was made of him. He says

that he knew he should not make such a statement for publication and that he had not intended to do so.

Because the accused did not tell the news agency, when inquiry was made, that the statement was not for publication and because he did not caution the reporter to whom he thought he was talking that the statement was not for publication, we agree with the Board of Governors that the statement was made under circumstances from which he could reasonably expect that it would be disseminated to the public.

The accused next contends that "to the extent it cuts off such comments (as were made here) when they cannot reasonably be said to affect the fairness of a contemplated trial, goes too far and encroaches on important constitutional rights of free speech and equal protection of the law." We agree with the accused's statement of the law, but hold that it has no application to the facts of this case because it is our judgment that the statements made here tended to prevent a fair trial. The accused cites cases of the United States Supreme Court relative to first amendment rights which hold that those who speak or write out of court about judicial proceedings cannot be punished without proof that their statements' publication created a clear and present danger to the fair and effective administration of justice. *See Craig v. Harney*, 331 US 367, 67 S Ct 1249, 91 L Ed 1546 (1947); *Pennekamp v. Florida*, 328 US 331, 66 S Ct 1029, 90 L Ed 1295 (1946); *Bridges v. California*, 314 US 252, 62 S Ct 190, 86 L Ed 192, 159 ALR 1346 (1941).

These cases do not deal with disciplinary action against lawyers but rather with criminal or contempt proceedings against laymen. We hold that these opinions are not applicable

to the present situation. When one is admitted to the bar he embraces certain ethical considerations and restrictions not required or expected of laymen which experience has indicated will be of benefit to the public if lawyers are required to obey them. One of these ethical rules, broadly stated, is that disputes should be tried by lawyers in court where limiting safeguards are available and not in the public news media.

It is this court's conclusion that the accused is guilty of misconduct as charged. This opinion will stand as a public reprimand to the accused, which we conclude is the proper disciplinary action merited.